

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4028

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P/S

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4028
78-4047

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,

Petitioners,

- against -

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

and

TRT TELECOMMUNICATIONS CORPORATION, et al.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR
TRT TELECOMMUNICATIONS CORPORATION

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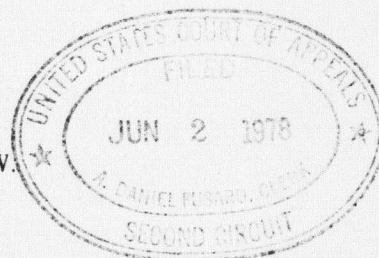
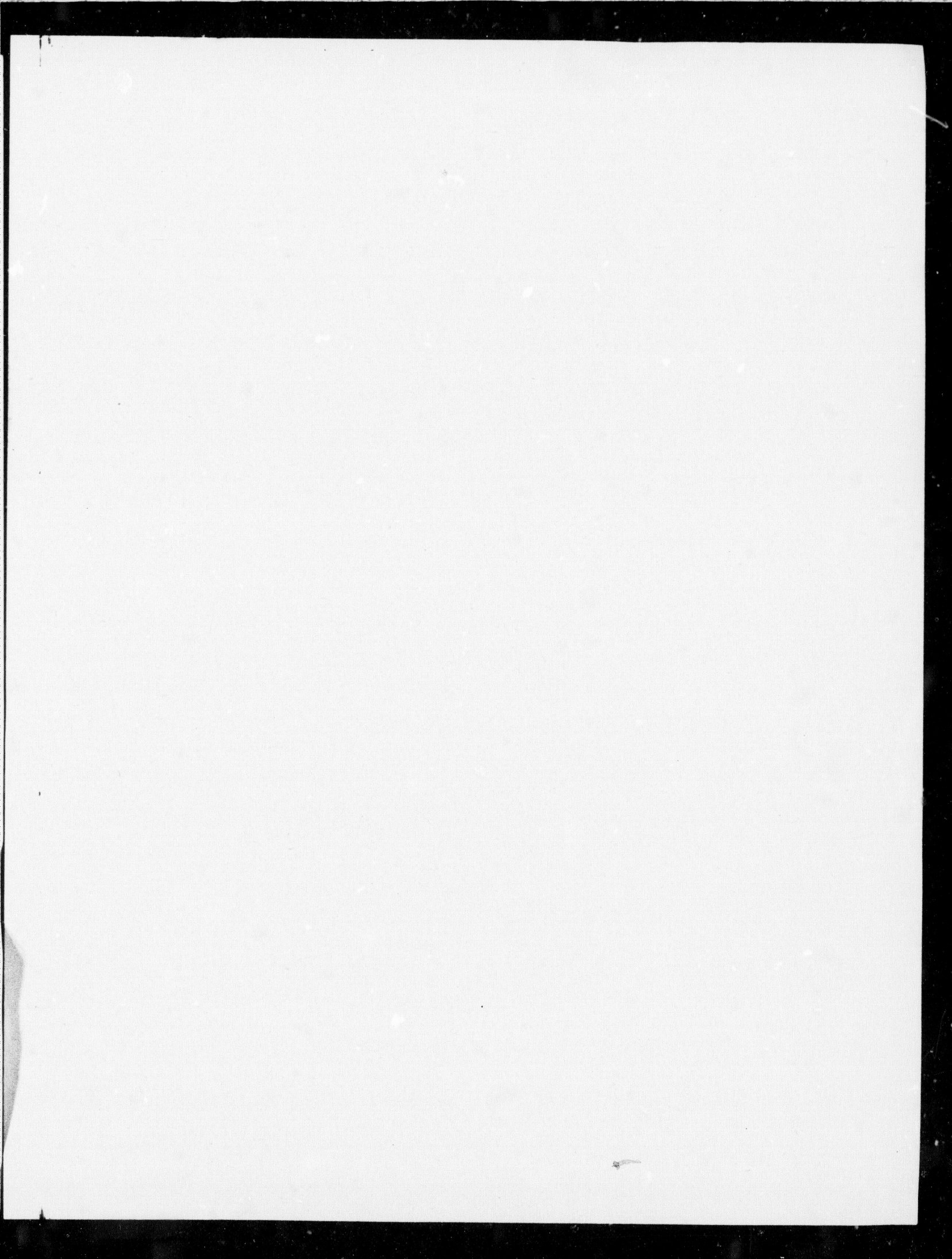


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ON PETITIONS FOR REVIEW OF
ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR
TRT TELECOMMUNICATIONS CORPORATION

This case comes before this Court pursuant to two petitions for review. The first was filed by ITT World Communications Inc. (ITT) and sought reversal, in part, of an order entered by the Federal Communications Commission (FCC or Commission) on January 11, 1977. The challenged portions of the order were those which granted applications under Section 214 of the Communications Act, 47 U.S.C. § 214, of

Graphnet Systems, Inc. (Graphnet), and Telenet Communications Corporation (Telenet) to provide data-communication services between the United States and various specified foreign points.

The second petition for review was filed by RCA in response to the FCC's order of April 3, 1978, which declined to reconsider its January 11, 1977 authorization of Graphnet and Telenet's international service. TRT Telecommunications Corporation (TRT) moved to intervene in the proceedings initiated by RCA's petition on the ground that the FCC's grant of Graphnet's and Telenet's Section 214 applications authorized these two entities to engage in consolidated domestic-international telecommunication operations in the face of Section 222 of the Communications Act, 47 U.S.C. § 222, as well as a long-standing FCC policy, both of which require a separation of the international and domestic segments of "record" (i.e. non-voice) communication services like those offered by Graphnet and Telenet.

TRT herein submits this brief to show that this Court should vacate the FCC's January 11, 1977 and April 3, 1978 orders, insofar as they authorize Graphnet and Telenet to provide consolidated domestic-international telecommunications services.

QUESTIONS PRESENTED .

1. Whether the FCC violated Section 222 of the Communications Act when it authorized domestic record carriers to provide international record communication services?

2. Whether, in view of the consistent Commission policy requiring the separation of domestic and international segments of record communications common carrier service, the FCC erred in authorizing domestic carriers to provide international service without explaining the reasons for its departure from that policy?

STATEMENT OF THE CASE

Introduction and Background. In order to appreciate the significance of the orders here under review, it is necessary first to understand the basic structure of the United States telecommunications industry, both in its domestic and international aspects. That industry has historically been divided into two functional parts -- "voice" (essentially telephone) and "record" (essentially telegraph). Within the United States, voice services have generally been provided by domestic telephone companies, including the Bell System operating companies and their parent, American Telephone and Telegraph Company (AT&T), which provides most of the "long-lines" services connecting the local operating companies. Internationally, AT&T long-lines has also provided the connections to allow voice communication between the United States and virtually all overseas points.

Record communication services have been provided on quite a different basis. Domestically, the Western Union Telegraph Company (Western Union) provides telegram service, as well as other record communication services, such as telex and TWX.^{1/} Additionally, others, such as the so-called "specialized common carriers," e.g., MCI (See 29 FCC 2d 870 (1971)), "domestic satellite carriers," e.g., Satellite Business Systems, a joint venture controlled by COMSAT and IBM (See 62 FCC 2d 997 (1977)), and "value-added" carriers, e.g., Graphnet and Telenet, (See 43 FCC 2d 922 (1973)), provide various forms of record communications services within the domestic market.

Neither Western Union nor any of the other above-mentioned carriers have been authorized by the FCC, prior to its orders in this case, to provide international record communications services. Such international service has traditionally been provided by the "international record carriers" (IRCs), principally TRT, RCA, ITT and Western Union International, Inc. (WUI).^{2/} And just as Western Union and the other domestic carriers have been barred from providing international service, the IRCs have consistently

^{1/} Domestic operations within the meaning of the Communications Act also include service between the United States and Mexico, as well as various points in Canada. See Section 222(a)(5).

^{2/} WUI is not affiliated with Western Union. It is the successor to "Western Union Cables," the international arm of Western Union which was divested by Western Union pursuant to Section 222(c)(2) of the Communications Act. See generally, Western Union Tel. Co. v. United States, 267 F.2d 715 (2d Cir. 1959).

been barred by the FCC from providing domestic service. See generally, Western Union International, Inc. v. FCC, 544 F.2d 87 (2d Cir. 1976), cert. denied, 98 S. Ct. 299 (1977).

In order to provide a thorough record communications service between points in the United States and foreign points, Western Union or other domestic carriers interconnect with the IRCs at so-called gateway cities,^{3/} where the IRCs receive outbound traffic for transmission abroad and where they transfer inbound traffic for delivery within the United States. Thus, as the FCC recognized in its January 11, 1977 order, for an IRC to provide data communication services, such as those described in the applications of Graphnet and Telenet, the IRC must interconnect with a domestic carrier.^{4/} (JA 3). Indeed, TRT has recently obtained FCC authorization to provide a data communications service between the United States and Italy that is identical to the service proposed by Telenet in this proceeding, but TRT must interconnect with Telenet or a similar domestic carrier to extend its service to United States points outside its

^{3/} The presently authorized gateways of the IRCs are New York, San Francisco, Washington D.C., New Orleans, and Miami. Within those gateways, the IRCs may pick up and deliver international traffic without interconnecting with domestic carriers.

^{4/} Just as with other forms of record communications service, no such interconnection is necessary for customers who are located within the gateway of the IRC.

gateways. See TRT Telecommunications Corporation, ____
F.C.C. 2d__ (Dec. 3, 1977).

The wall of separation which the FCC has maintained between domestic and international record services is further illustrated by the FCC's action upon recent applications of entities affiliated with one of the IRCs to provide service within the domestic market. Thus, for example, when RCA sought to initiate domestic satellite services, the FCC conditioned its authority to require a complete separation between RCA's domestic and international operations.^{5/} Indeed, while RCA's domestic satellite affiliate may interconnect with TRT, ITT and WUI for the joint provision of domestic-international services, it may not so interconnect with RCA's international circuits. The Commission has taken exactly the same approach in separating RCA's and ITT's domestic "specialized" carriers from their international affiliates. See pp. 28-30 below.

In granting the international service applications of Graphnet and Telenet, both of whom heretofore have been engaged exclusively in domestic operations, the Commission has sanctioned for the first time since 1943 when Section 222 was enacted, the provision of consolidated domestic-international record services via a single carrier.

Proceedings Below. The roots of this case extend back to early 1976 when first Graphnet (JA 45) and then

^{5/} RCA Global Comm., Inc., 56 F.C.C. 2d 660 (1975).

Telenet (JA 76) filed applications pursuant to Section 214 of the Communications Act to extend their domestic services to international points.

TRT, ITT, RCA and WUI each opposed the Graphnet and Telenet applications. In filing these oppositions, the claim was expressly raised that the Commission should not sanction international operations by domestic carriers, such as Graphnet and Telenet, when those services would be provided in competition with the services of the IRCs who, as RCA argued the matter, are "precluded by Commission decision from furnishing domestic and international services through the same corporate entity." (JA 271). Thus, the IRC position, as articulated by RCA, was that:

"consistency of Commission regulation, therefore, requires that Telenet's domestic franchise not be extended to the international field or that such franchise be extended only through a separate corporate enterprise which would deal with its domestic counterpart at arm's length." (JA 271-72).

Following receipt of the pleadings from all interested parties, the FCC issued its first order in this proceeding on January 11, 1977. (JA 1). In that order, the FCC granted applications that had previously been filed by RCA and WUI to provide international data transmission services like those proposed by Graphnet and Telenet in their applications.

However, unlike the Graphnet and Telenet proposals, RCA and WUI were limited to providing international service.

Having granted the RCA and WUI applications solely for international service, the Commission then determined in the January 11, 1977 order to grant the Section 214 applications of Graphnet and Telenet to provide a consolidated domestic-international data communications service. In doing so, the FCC responded to the RCA argument with respect to the separation of international and domestic operations as follows:

"RCA's allegations regarding competitive disadvantage apparently derive from the fact that RCA, as an international telegraph carrier, is restricted by Section 222 of the Act from domestic telegraph operations other than accepting or delivering international telegraph messages in designated gateway cities; whereas Graphnet and Telenet, which are not international telegraph carriers as defined in Section 222, are not similarly restricted." (JA 7-8).

In so rejecting RCA's argument, the Commission referred to the definition contained in Section 222(a)(3) of an "international telegraph carrier" as a "common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations" and observed that Graphnet and Telenet, whose applications to initiate international service were pending before it, "clearly do not fall within this definition." (JA 8). The Commission did not, however, address the question of whether Graphnet and Telenet were "domestic telegraph carriers"

within the meaning of Section 222(a)(2) of the Act -- i.e., "any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations" -- nor did it address the issue of whether a domestic telegraph carrier can provide international service consistent with the requirements of Section 222.

RCA filed a timely petition for reconsideration with the FCC challenging all aspects of its decision to grant the Graphnet and Telenet Section 214 applications to provide consolidated domestic-international service.^{6/} TRT filed comments with the FCC upon RCA's reconsideration petition. (JA 698). In those comments, TRT argued that, over the 34 years that had elapsed since the passage of Section 222 of the Communications Act, the FCC had followed a policy of separating the international and domestic services of record common carriers subject to its jurisdiction. The FCC accurately summarized TRT's position on rehearing:

"TRT's comments in support of the RCA petition state that the fundamental issue raised by these applications is whether the data services should be provided as interconnected services from authorized gateways by international carriers or whether they should be provided as through services by

^{6/} There has been no challenge either at the FCC or in court to those parts of the FCC's order which granted RCA's and WUI's Section 214 applications to provide international data communications service.

domestic carriers. TRT states that Commission policy has traditionally been to apply the former approach and that the Commission departs from that policy without any investigation as to the purposes of the separations policy, why it is inapplicable to the new services and whether fair competition between the new entrants though services and the existing carriers is feasible." (JA 29).^{7/}

While accurately summarizing TRT's position, the Commission failed in its Order on Reconsideration, just as it had previously failed in its original January 11, 1977 order, to explain the policy considerations underlying its decision to allow Graphnet and Telenet to provide interconnected service.^{8/}

^{7/} TRT specifically delineated five issues that the Commission should address before determining to grant the applications of Graphnet and Telenet to provide consolidated domestic-international service -- whether the policy consideration underlying a separation of domestic international record services applied to data transmission services; whether domestic data carriers, like Graphnet and Telenet, would provide domestic services and facilities to the IRCs upon non-discriminatory terms and conditions; whether interconnection arrangements should be prescribed to assure the IRCs a fair opportunity to compete with the integrated operations of Graphnet and Telenet; whether the Commission should exercise a heightened degree of regulatory supervision over the integrated operations of Graphnet and Telenet; and whether special interconnection arrangements and the like would be required to assure that the international data services provided by domestic carriers will be available to subscribers of competing domestic networks on an equitable basis. (JA 701-02).

^{8/} Telenet and Graphnet had filed motions to strike TRT's comments on the ground that they constituted an untimely petition for reconsideration. The Commission acting pursuant to those motions determined that it would not consider TRT's request that the authorizations for Telenet and Graphnet be

(footnote cont'd)

For notwithstanding its recognition of the position set forth by TRT in its comments, the Commission denied reconsideration of the Graphnet and Telenet authorizations merely by observing that the IRCs "will be formidable and effective competitors" to Graphnet and Telenet, so that the "suggested corporate arrangements, i.e., separate international and domestic subsidiaries of Graphnet and Telenet, are unnecessary at this time." (JA 39). In so disposing of TRT's contentions, the Commission did not explain why the "formidable and effective competit[ion]" of other international carriers justified deviation from the Commission's general separation policy. No indication was given by the FCC as to why such a concept -- which would seem equally applicable to TRT, an entity that is the smallest of the IRCs and is certainly faced with "formidable and effective competitors" in the form of RCA, ITT and WUI -- sufficed to justify the authorization of consolidated domestic-international services by Graphnet and Telenet.

Believing that the Commission dealt with the applications of those two entities on an ad hoc basis,

(footnote cont'd)

set aside pending an evidentiary hearing. The Commission went on, however, to hold that TRT was entitled to file comments on the RCA petition which the FCC purported to discuss in its order on reconsideration:

"The substantive issues raised by the TRT comments are considered in the course of our discussion concerning the RCA petition." (JA 21).

without even attempting to justify its action in terms of the requirements of Section 222 and the policy of separation that the FCC has always heretofore observed in applying that section, TRT intervened in this proceeding to test the lawfulness of the FCC orders.

ARGUMENT

I. THE FCC'S AUTHORIZATION OF GRAPHNET'S AND TELENET'S CONSOLIDATED DOMESTIC-INTERNATIONAL SERVICE VIOLATES SECTION 222 OF THE COMMUNICATIONS ACT.

We would be less than candid if we did not concede at the outset that Section 222, as it defines what this Court has referred to as the "peculiar" structure of the record communications industry, Western Union International, Inc. v. FCC, supra, 544 F.2d at 89, is less than a model of clarity. This concession, however, far from detracting from the force of the point which TRT advances in this brief, underscores the shortcomings of the FCC orders here under review. For rather than attempting to offer an interpretation of this section, the FCC simply granted Graphnet's and Telenet's applications without any focused attention to the application of Section 222 in this case. Thus, in this case, just as in Western Union International, Inc. v. FCC, where the FCC was reversed for deviating from its prior interpretation and application of the statute, "no special weight can be placed on the FCC's latest interpretation of Section 222." 544 F.2d at 91.

A. Section 222(a)(5) Generally Prohibits
IRCs From Engaging in Domestic Operations

The first point to be made about Section 222 is that the substantive limitations bearing upon the scope of the authorizations that can be granted domestic or international carriers arises out sections of the statute that are both definitional and prohibitory. Of foremost concern here, Section 222(a)(5) provides that:

"The term 'domestic telegraph operations' includes acceptance, transmission, reception and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States [as well as other North American points]... and terminate or originate at points within the continental United States [and other North American points] and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States [and other North American points]....: Provided, that nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States...." (emphasis supplied).

That Section 222(a)(5) is prohibitive, as well as definitional, is readily apparent from the gateway proviso emphasized in the above-quoted portion of that section. For there is nothing in Section 222, other than the definition

of "domestic telegraph operations" within Section 222(a)(5), that in any way prohibits "international telegraph carriers" from engaging in domestic operations. Accordingly, the presence of the gateway proviso in that section can be understood only as a consequence of Congress' intent to cast Section 222(a)(5) as a general bar to international carriers engaging in domestic operations.

The Commission has long interpreted Section 222(a)(5) in exactly this fashion. Thus, in Docket No. 19660, In re International Record Carriers' Scope of Operations, 40 FCC 2d at 1082 (1973), a proceeding of which more will be said later (pp. 26-28, infra), the FCC rejected IRC tariff filings which sought to allow the IRCs to receive, on a collect basis, traffic from customers located outside of the IRCs' gateways:

"Under section 222 the handling of international telegraph messages within the continental United States is a 'domestic telegraph operation,' and the section does not contemplate IRC participation in such operations beyond that provided for by the proviso contained in Section 222(a)(5)." 40 FCC 2d at 1085.

The FCC concluded that this construction of Section 222(a)(5) was essential to preserve the structure of the international record communications industry envisioned by Congress when it enacted Section 222:

"Any other interpretation [of Section 222(a)(5)] would undermine the Congressional determination that WU [Western Union] should principally engage in domestic operations and the IRC's should principally engage

in international operations." 40 FCC
2d at 1086.

This view of Section 222(a)(5), as embodying a substantive limitation upon the actions of the IRCs, is faithfully reflected in the Commission's January 11, 1977 order in the proceedings below. For, as we demonstrated above (p. 8), the FCC justified its restriction of RCA and other IRCs' provision of only the international segment of data service solely on the basis of Section 222:

"RCA, as an international telegraph carrier, is restricted by Section 222 of the Act from domestic telegraph operations other than accepting or delivering international telegraph messages in designated gateway cities."
(JA 8-9).

Moreover, within the past few weeks the Commission has twice reiterated this view of the Communications Act. In RCA Globcom Systems, Inc., File No. W-P-C-1396, released April 18, 1978, the FCC mandated a separation of the domestic operations of an affiliate of RCA and the international operations of RCA, in reliance upon the requirements imposed upon IRCs by Section 222(a)(5). And in Western Union Telegraph Company, Trans. Nos. 7347-48, released May 25, 1978, the Commission held that "the IRCs are permitted to operate from only a limited number of 'gateway' cities," citing Section 222(a)(5).

Thus, there can be no question but that the Commission has consistently interpreted Section 222(a)(5) as barring international carriers from domestic telegraph

operations, except insofar as they are explicitly permitted to conduct gateway operations by the proviso to that section. Such a consistent interpretation of the statute is, under conventional judicial review principles, entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16 (1968). That deference becomes conclusive when reference is made to the legislative history of section 222(a)(5).

Section 222 was added to the Communications Act by virtue of an amendment passed by Congress in 1943. The principal occasion for that amendment was the serious financial difficulties that were being experienced by Postal Telegraph Company, then one of the principal domestic telegraph companies. See generally, Western Union International, Inc. v. FCC, supra, 544 F.2d 87.

In order to address the general condition of the telegraph industry, both in its domestic and international aspects, a Senate resolution was adopted calling for a comprehensive study of the telegraph industry. Hearings on that study were held in May 1941 by the Senate Committee on Interstate Commerce. Study of the Telegraph Industry, Hearings on S.Res. 95, Committee on Interstate Commerce, U.S. Senate, 76 Cong., 1st Sess., (May 1941). At that time, FCC Chairman Fly referred to the fact that two of the international telegraph carriers -- RCA Communications (the predecessor to RCA Global Communications, Inc.) and Mackay Radio Company (then a subsidiary of the International Telephone & Telegraph Company and now merged into ITT) conducted

substantial domestic radio-telegraph services in competition with the wire-line services of Western Union and Postal Telegraph. He offered the view that

"Any integration of the telegraph industry should, in my judgment, involve discontinuation of these domestic radio-telegraph services." (Id. at 20).

Upon the close of the Senate hearings, a report was issued to summarize the evidence gathered in the Telegraph Study and to articulate the recommendations that the Senate Interstate Commerce Committee had derived from that study. Sen. Rep. No. 769, Committee on Interstate Commerce, U.S. Senate, 77 Cong. 1st Sess. (October 28, 1941). There too reference was made to the "purely domestic" aspect of ITT and RCA's business, which was said to constitute approximately 15% of their revenues. (Id. at 7). The Senate Committee further stated that

"to ease the burden which these radio-telegraph carriers [ITT and RCA] impose on the ordinary domestic wire telegraph carriers [Western Union and Postal Telegraph] they can be required to limit their business solely to the pick-up and delivery of international messages, leaving the domestic field to the domestic carriers." (Id. at 21).

In the conclusion of its report, the Senate committee recommended

"permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity." (Id. at 25).

Following the issuance of the Senate report, a bill (S.2445) was introduced in the Senate to propose for

enactment the recommendations of the Senate Interstate Commerce Committee report. Consistent with those recommendations, it provided for the mergers of both domestic and international telegraph carriers. (See 88 Cong. Rec. 5419, 5421 (remarks of Senator McFarland)). However, the bill was amended in committee (and restyled S.2598) so that, when reported to the floor of the Senate, it provided only for the merger of domestic telegraph carriers. (Id. at 5419). Of greatest significance here, the amended Senate bill contained a definition of "domestic telegraph operations," which is the same as that now contained in Section 222(a)(5) and which included a "gateway proviso" virtually identical to the gateway proviso enacted in Section 222(a)(5). (Id. at 5418).^{9/}

After its passage by the Senate, the House conducted hearings on the Senate bill. Hearings on S.2598, before the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 77 Cong., 2d. Sess. (July 1942). At that time, FCC Chairman Fly amplified the remarks which he had made previously in the Senate hearings concerning the total divorcement of international and domestic telegraph operations:

"[W]e do not want the domestic companies to have any international arrangements there are so many difficulties there that we do not think it is wise to have such a

^{9/} The gateway proviso of S.2598 differs from Section 222(a)(5) only by virtue of the inclusion in the section as enacted of the words "under regulations prescribed by the Commission." It should also be noted that S.2598 placed the definitions for Section 222 in part (g) of the section, rather than part (a). Thus, Section 222(a)(5), as enacted, corresponds to Section 222(g)(5) of S.2598.

tie-in At the same time, I think that they [domestic operations] ought to be severed from any international operations, and leave these operations to entirely separate and independent companies." (Id. at 16).^{10/}

The representatives of both Western Union and the IRCs who testified at the House hearings clearly recognized that the definition of "domestic telegraph operations," as well as the gateway proviso to that definition, constituted a general bar to IRC participation in domestic operations. Thus, Mr. A. N. Williams, President of Western Union testified that

"If there is to be a merger or consolidation in the domestic telegraph field, and particularly if the domestic carrier is to be barred ultimately from the international field, obviously international telegraph carriers should not be permitted to operate circuits within the continental United States." (Id. at 71).

Pursuant to this position, Mr. Williams offered a minor amendment to the gateway proviso to prevent IRCs from engaging in the "incidental transmission or reception of [communications] over its own or leased lines or circuits" except "within such [gateway] cities" instead of "within the continental United States," the language of Section 222(g)(5) of S.2598 and the present language of the gateway provision of Section 222(a)(5). (Id. at 71).

^{10/} The domestic operations of ITT and RCA to which Chairman Fly made reference in his testimony had ceased pursuant to government agency orders during World War II. Id. at 58 (testimony of F. W. Phelan, President of All American Cables & Radio Corp.); Id. at 91 (testimony of W. A. Winterbottom, Vice President of RCA communications)).

RCA Communications' Vice President, Mr. Winterbottom, strongly opposed this amendment of the gateway proviso, arguing that it would restrict IRC operations in a fashion that would not allow them even to interconnect their own gateway offices for transmission of international traffic (Id. at 94), and Mr. Winterbottom's view ultimately prevailed. The significant point here, of course, is that both Western Union and the IRCs recognized that the gateway proviso was a substantive limitation on IRCs' operations in the United States.

S.2598 was not enacted during the 77th Congress. Accordingly, there was introduced into the 78th Congress, a bill (S.158) to achieve the same purposes as S.2598. Thus, the Senate report on S.158, Sen. Rep. No. 13, Committee on Interstate Commerce, U.S. Senate, 78 Cong., 1st Sess. (January 18, 1943), simply incorporated the Senate committee's prior report on S.2598.

S.158, however, as it emerged from the House committee was amended to delete in its entirety the gateway proviso to the definition of "domestic telegraph operations." See H.R. Rep. No. 69, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 78 Cong., 1st Sess. (February 1, 1943). In explaining this action, the House Committee stated:

"Since the committee substitute [as it amended S.158] does not have a provision requiring divestment of telegraph operations of any kind, and does not have provisions

that would prevent international companies from carrying on the operations referred to in the above [i.e. gateway] proviso, the proviso has been omitted as unnecessary." (Id. at 6).

The differences between the House and the Senate necessitated a conference on S.158. The Senate conferees insisted on retaining the provision requiring Western Union's divestiture of its international operations, as well as the gateway proviso, and the House conferees gave way on this point. The retention of the gateway proviso was explained as follows (H.R. Rep. No. 142, Conference Report, 78 Cong., 1st Sess. (February 18, 1943)):

"It was felt desirable to include this proviso [to Section 222(a)(5)], in order to clearly permit carriers to continue the operations referred to, because of the requirement [in Section (c)(2)] that in case of a consolidation or merger of domestic telegraph companies the plan of consolidation or merger shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger." (Id. at 10).

Section 222(a)(5) was, therefore, enacted with the gateway proviso in substantially the same form in which it was originally proposed.

The legislative history of Section 222(a)(5), therefore, shows quite clearly that the definition of "domestic telegraph operations" was meant to exclude all IRC participation in these operations, except as explicitly permitted by the gateway proviso. All elements of the history underlying this section -- FCC Chairman Fly's testimony about the complete separation of domestic and international operations;

the conclusion of the initial Senate report that IRCs should be restricted "to ease the burden" which they imposed on domestic carriers; the understanding of both Western Union and the IRC representatives; and the insistence on that proviso by the Senate conferees -- coalesce to support the view of the statute that the FCC has long adhered to. That being the case, there can be no question but that Section 222(a)(5) restricts IRCs from participating in domestic telegraph operations, except as they are explicitly allowed to do so by the gateway proviso of that section.

B. Section 222(a)(6) Prohibits Domestic Carriers
From Engaging in International Operations

In terms that are virtually the mirror image of those used in Section 222(a)(5) to define domestic operations, Section 222(a)(6) defines the scope of international operations as follows:

"The term 'international telegraph operations' includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States [as well as other North American points], but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States."

The most significant point to be observed about Section 222(a)(6), beyond its close correspondence to Section 222(a)(5), is that, unlike Section 222(a)(5), it includes no proviso of any kind allowing domestic telegraph carriers to engage in any form of "international telegraph operations." Given the symmetry of the two sections, if 222(a)(5) limits international carriers to only that form of operations specifically described in the proviso to that section, then under Section 222(a)(6) domestic carriers, like Graphnet and Telenet, cannot be authorized to engage in any international telegraph operations.^{11/}

This conclusion is supported by conventional principles of statutory construction. First, in "interpreting a statute the court will look not merely to a particular clause . . . but . . . the whole statute . . . and the objects and policy of the law" Brown v. Duchesne, 19 How. (60 U.S.) 183, 194 (1857), quoted with approval in Kokoszka v. Belford, 417 U.S. 642, 650 (1974). See also Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Richards v. United States, 369 U.S. 1, 11 (1962). Thus, in interpreting Section 222(a)(6), the Court should be guided by the principles and policies -- most importantly the separation of international and domestic operations -- which the FCC has

^{11/} As noted above (pp. 8-9), the FCC in its January 11, 1977 order held that Graphnet and Telenet are not "international telegraph carriers within the meaning of Section 222(a)(3)," but did not address the issue of whether they are "domestic telegraph carriers" within the meaning of Section 222(a)(2).

consistently derived from the corresponding language in Section 222(a)(5) and which the legislative history of Section 222 clearly compels.^{12/}

Secondly, under the established principle of expressio unius est exclusio alterius, see Continental Cas. Co. v. United States, 314 U.S. 527, 553 (1942), Congress' definition of "international telegraph operations" without any proviso authorizing domestic carriers to engage in such operations implies that Congress intended to exclude them from such operations. And when Congress went on to include in Section 222(a)(5) an explicit proviso permitting limited international carrier participation in "domestic telegraph operations" the inference that Congress envisioned no role for domestic carriers in international operations becomes compelling. Cf. FTC v. Sun Oil Co., 371 U.S. 505, 514-15 (1963); Herzberg v. Finch, 321 F. Supp. 1367, 1369 (S.D.N.Y. 1971).

^{12/} Section 222(b) & (c) make specific provision for the discontinuation of international operations by a domestic carrier upon its application to merge with another domestic carrier. As this Court made clear in Western Union International, Inc. v. FCC, supra, 544 F.2d 87, 90, when it discussed the legislative history of Section 222, these subsections were drafted for the specific purpose of providing the means to allow Western Union and the Postal Telegraph Company to merge, as they soon did, into a monopoly provider of domestic record carrier service which would divest its international operations. Thus, those sections apply only to the particular circumstances of the Western Union - Postal Telegraph merger. As to domestic carriers who have been authorized by the FCC to initiate service subsequent to the enactment of Section 222 and for whom there is no reason to anticipate merger applications, it is necessary to refer to Section 222(a)(6) to determine their authorized scope of operations.

Finally, we note that the construction imposed upon Section 222(a)(5) by the FCC forces a corresponding construction of 222(a)(6) in order to avoid what would otherwise be an almost impossible anomaly in the statutory scheme embodied in Section 222.

If a domestic telegraph carrier could properly be authorized to provide international service, the time could well come that the international segment of its consolidated operations would outweigh the domestic aspect of those operations. At that time, the consolidated carrier would then become an "international telegraph carrier" within the meaning of Section 222(a)(3), since "the major portion" of its "traffic and revenues" would then be derived from "international telegraph operations." Indeed, it is not fanciful to suggest that, from accounting period to accounting period, the status of the consolidated carrier could change, so that it would have to operate in compliance with the separation principle of Section 222(a)(5) at certain times of the year when its international revenue's predominated, but not at other times when its domestic revenues were in the ascendancy. It is difficult to imagine that Congress intended to create such an administrative nightmare.

But, of course, these anomalies can be completely avoided if Section 222(a)(6) is construed in the same manner as Section 222(a)(5). For then domestic telegraph carriers would be limited to domestic telegraph operations in the same fashion that international carriers are restricted to international operations.

II. THE COMMISSION'S GRANT OF THE GRAPHNET AND TELENET APPLICATIONS REPRESENTS AN ABRUPT DEPARTURE FROM PRIOR AGENCY POLICY WITHOUT ADEQUATE EXPLANATION.

We have set out in Part above what we respectfully submit is a cogent and persuasive construction of Section 222 of the Communications Act that is inconsistent with the grant of Graphnet and Telenet's application to provide consolidated domestic-international telecommunication service. But even assuming, arguendo, a contrary view of the statute that would permit the FCC to authorize a domestic carrier to engage in international operations, it is clear that the FCC below did not adequately explain the reasons for its action in this case. For given the fact that the FCC has for years -- indeed, since the 1943 adoption of Section 222 -- carefully segregated all domestic and international aspects of record communication service, the Commission was obliged, prior to granting Graphnet and Telenet's application, to examine its prior policy and to give an adequate statement of reasons for its departure from that policy.

In Docket 19660, which was initiated in 1972 and which has been the source of two FCC orders interpreting Section 222 that have previously been reviewed in this Court,^{13/} the

^{13/} Western Union International Inc. v. FCC, supra 544 F.2d 87, reversing 55 F.C.C.2d 668 (1975), and RCA Global Communications, Inc. v. FCC, 559 F.2d 881 (2d Cir. 1977), on reconsideration, 563 F.2d 1 (2d Cir. 1977) remanding 57 F.C.C.2d 190(1976), ___ F.2d ___ (No. 993 - Sept. Term 1977, dec. April 18, 1978) affirming after remand, 67 F.C.C.2d ___ (1978) (re the international formula under Section 222(e) for the distribution of outbound traffic among the IRCs).

Commission acknowledged that there was "a complex of issues which are essentially interrelated" bearing on the inter-relationship between the ICRs and the domestic telegraph company. In re International Record Carriers' Scope of Operations, 38 F.C.C.2d 543, 544 (1972). Accordingly, the Commission instituted a general policy proceeding

"to reevaluate the existing institutionalized methods and practices involved in the pickup and delivery of international traffic originating at or delivered to hinterland points outside of the established gateway cities" 38 F.C.C.2d at 546.

In so proceeding, the Commission disavowed "independent consideration with a separate proceeding for each" of the matters pending before it, preferring instead "a general inquiry which will address, on a consolidated basis, the broad and important public interest issues posed" to it. 38 F.C.C.2d at 546 (emphasis supplied).

The first priority in Docket 19660 was to act upon the proposals of the IRCs to receive collect calls from customers located outside IRC gateways. As previously noted (p. 14), the Commission disapproved this proposal on the ground that the IRCs were not entitled to provide such domestic service in the light of Section 222(a)(5). The Commission went on, however, to articulate significant policy reasons buttressing its construction of the statute:

"Under the proposed tariffs, . . . acceptance and delivery of international messages will no longer occur at the IRC's gateway offices, but will shift to the point in the hinterland where the customer

is located. This will certainly alter the structure of the industry by altering the relationships between the domestic and international carriers as to the handling of international traffic. In large measure, it will render the statutory differentiation between gateway and hinterland meaningless so far as international telegraph messages are concerned" 40 FCC 2d at 1086.

The continuing vitality of the FCC's Docket No. 19660 policy and the aberrational character of the FCC's orders here is further underscored by the FCC's recent action in RCA Global Communications Systems, Inc., File No. W-P-C-1396, April 18, 1978, which was released only 15 days after the FCC's refusal to grant reconsideration of the Graphnet and Telenet orders. In that proceeding the Commission required a separation of RCA's proposed new domestic and its existing international services on the grounds that "the policy against their interconnection is applicable."^{14/}

^{14/} The rigor with which the FCC has applied this "policy" is readily perceived by the specific conditions insulating RCA Systems' domestic operations from RCA Globcom's international activities:

Separate marketing, accounting, customer relations and operating departments;

The maintenance of separate accounting records;

Nonsharing of management, maintenance or other service personnel;

Maintenance by RCA Systems as confidential of all proprietary information concerning its customers;

Segregation of office space;

(footnote cont'd)

The FCC's conditioning of RCA's recent domestic authority is consistent with similar limitations, equally strict, which the FCC imposed upon ITT and its domestic specialized carrier affiliate, United States Transmission Systems (USTS). In the initial grant of authority to USTS to commence service, the Commission ordered USTS not to interconnect with ITT for the provision of any international service pending resolution of the issues presented in Docket 19660. United States Transmission Systems, 48 F.C.C.2d 859, 863 (1974), aff'd, 539 F.2d 767 (D.C. Cir. 1976). Upon ITT and USTS petition for reconsideration of the non-interconnection condition, the Commission amplified the reasons for its policy:

"[U]nlike the case where AT&T or another independent domestic carrier supplies the domestic link, interconnection of ITT and USTS will represent ITT operations in the hinterland and will fundamentally alter the structure of the industry by altering the relationships between domestic and international carriers.

* * *

"An interconnection between ITT and USTS could well blur or abolish any practical

(footnote cont'd)

Procurement of equipment and transmission facilities on an arm's length basis;

Noninterconnection except to continue service for existing customers; and

Extensive reporting responsibilities of the FCC to allow it to monitor these matters.

distinction between gateway and hinterland, since ITT would have direct access to hinterland points through a commonly controlled corporation, and such interconnection might be inconsistent with the ultimate decision in Docket No. 19660.

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"[I]t is important that these [gateway] questions be resolved in Docket No. 19660, where the totality of existing methods and practices involved in the pickup and delivery of international traffic originating at, or delivered to, hinterland points can be examined." 51 F.C.C.2d 207, 209 (1975).

The Commission's approval of the Graphnet and Tele-net applications, without even advertng to the manner in which such action implicates the policy issues underlying Docket No. 19660 and related proceedings, plainly reveals that the FCC simply ignored those issues in determining to authorize Graphnet and Telenet's international service. For, in the words of the FCC's USTS decision, the grant of these applications "fundamentally alters the structure of the industry by altering the relationships between the domestic and international carriers" every bit as much as the proposals of RCA and ITT to provide interconnected services with their subsidiaries. Similarly, the Commission's authorization of international service by domestic carriers "could well blur or abolish any particular distinction between gateway and hinterland" in the provision of international communications service. Thus, if it is "important" that IRC initiatives which may have these effects "be resolved in

Docket No. 19660, where the totality of existing methods and practices involved in the pickup and delivery of international traffic" can be examined, it seems no less "important" that the Graphnet and Telenet applications be dealt with in the broader perspective of the issues presented in that proceeding.

We, of course, recognize that the FCC, like other regulatory agencies, has a measure of discretion as to the manner in which it decides to dispose of its docket and to order its own proceedings. See e.g., Vermont Yankee Nuc. Power Corp. v. NRDC, ___ U.S. ___, 98 S.Ct. 1197, 1211-12 (1978); FCC v. Schreiber, 381 U.S. 279 (1965). We, accordingly, do not argue here that the Commission was bound to await the outcome of the policy determinations in Docket No. 19660 prior to acting on the Telenet and Graphnet applications. What we do urge, however, is that if the Commission is to proceed separately with respect to these applications, it must, at the very least, explain why the policy which it applies in other similar contexts is not applicable to Graphnet and Telenet.

This the Commission quite clearly failed to do here. For notwithstanding TRT's arguments below, the FCC refused to recognize the manner in which its grant of the Graphnet and Telenet applications violated the policy of separating domestic and international record communication operations which gave rise to the FCC's determination to institute Docket No. 19660.

In thus failing to recognize its departure from its own policy, the FCC has violated "an elementary tenet of administrative law . . .," namely "that an agency must either conform to its own precedents or explain its departure from them." International Union v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); accord, K. Davis, ADMINISTRATIVE LAW OF THE SEVENTIES, § 17.07-3, at 412-13 (1976); see also, Sirbo Holdings, Inc. v. Commissioner of Internal Revenue, 476 F.2d 981, 987 (2d Cir. 1973).

As this Court has stated in reversing the FCC for a similarly unexplained change of policy, when "the Commission is seeking to change its policy . . ., such changes in policy must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and . . . that [the agency] is faithful and not indifferent to the rule of law.'" Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977), citing Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971). See also Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

We know of no better way to close our argument on this point than to quote the same language from the opinion of the D.C. Circuit in Marine Space Enclosure v. FMC, 420 F.2d 577, 585 (1969), which TRT urged upon the FCC in its unsuccessful effort to obtain reconsideration of the Telenet and Graphnet authorizations (JA 700-01):

"It is, to say the least, surprising that the Commission would depart from its own prior decisions . . . without discussing what points might further require an evidentiary hearing. It is surprising to the point of concern that the Commission would make such a departure in an opinion that offers the sparsest of findings and speaks in the most conclusory terms.

"An agency may modify or even reverse its past policies and announcements, but the confidence of a reviewing court that these adjustments are made in accordance with the requirements of law is not enhanced when the prior precedents are not discussed, the swerves and reversals are not identified, and the entire matter is brushed off once over lightly."

Here, it would be generous to refer to the Commission's disposition of the policy questions presented by the Graphnet and Telenet applications as having been "brushed off once over lightly." Notwithstanding TRT's focused attention to the matter, which the Commission itself acknowledged in its Order on Reconsideration (JA 29), the Commission simply ignored its policy of separating international and domestic record communications service and granted the challenged applications without any indication of the reasons for its refusal to follow that policy.

CONCLUSION

For the reasons stated in Part I above, this Court should hold that the FCC's grant of the Graphnet and Telenet

applications to provide international service violates Section 222 of the Communications Act. Alternatively, for the reasons stated in Part II above, this Court should hold that the FCC's grant of the Graphnet and Telenet applications was based upon an unexplained departure from established Commission policy.

Respectfully submitted,

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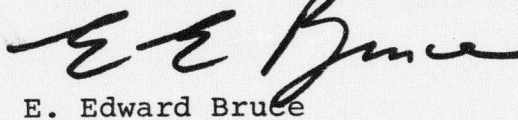
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Re: ITT World Communications, Inc., et al.
v. FCC, Nos. 77-4028 & 78-4047

Dear Sir:

Enclosed are ten copies of the Brief of TRT Telecommunications Corporation, who intervened in No. 78-4047 in support of the position urged there by petitioner RCA Global Communications, Inc. In light of the court order entered on May 25, 1978 extending RCA's filing date until May 31 and in view of the fact that TRT's Brief as an Intervenor is filed in support of RCA's position, I am filing this brief on the date set by this Court for the filing of RCA's brief.

Respectfully submitted,


E. Edward Bruce

EEB:md
Enclosures

cc: All counsel of record

CERTIFICATE OF SERVICE

I, E. Edward Bruce, a member of the bar of this Court, hereby certify that copies of the foregoing Brief of Intervenor TRT Telecommunications Corporation were served by mail, postage prepaid, this 31st day of May, 1978, upon the following persons:

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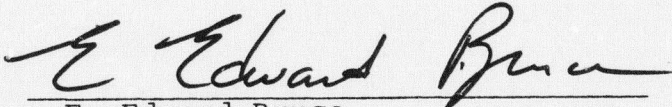
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